No. 21127

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HORACE MEYER, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The opinion of the district court is reported at 38 F.R.D. 411.

JURISDICTION

The jurisdiction of the district court over this condemnation suit was invoked under 28 U.S.C. sec. 1358. Judgment of dismissal was entered on May 10, 1966 (R. 163-164). Notice of appeal was filed by the United States on May 26, 1966 (R. 165).

QUESTIONS PRESENTED

1. Whether the discovery provisions of the Federal Rules of Civil Procedure compel the disclosure, by independent appraisers employed by the United States to value land to be acquired, of unapproved and unaccepted appraisals, of all notes made in connection therewith and of their reasoning in, for example, considering particular sales not to be comparable, all without any showing of special need for such disclosure, and where the facts they relied upon, such as location of the property, etc., were disclosed.

2. Whether a district court is authorized to strike a declaration of taking and to dismiss condemnation proceedings for failure to make such discovery.

FEDERAL RULES INVOLVED

Rule 26, Federal Rules of Civil Procedure, provides:

> (a) When Depositions May be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that

in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 30 provides:

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written

interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * *

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose

upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Rule 34 provides:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 37 provides:

> (a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the

district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copy-

ing, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn

denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) Failure to Respond to Letters Rogatory. A subpoena may be issued as provided in Title 28 U.S.C., § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

Rule 71A provides:

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the

power of eminent domain, except as otherwise provided in this rule.

* * * *

(c) Complaint.

* * * *

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. * * *

* * * *

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading

or motion asserting any additional defense or objection shall be allowed.

STATEMENT

On January 15, 1964, a complaint, together with a declaration of taking, was filed by the United States to acquire two designated parcels of land, totaling 364 acres, owned by Horace Meyer, for use in connection with the Yosemite National Park (R. 1-11). An order for immediate delivery of possession was entered the same day (R. 12). Horace Meyer sought distribution of the $325,500 deposited as estimated compensation, and it was so ordered (R. 14-18).

On September 30, 1964, Meyer gave notice of the taking of depositions of Robert Wilson, James Hopper and Charles Sortor (R. 20-21). The subpoenas sought "all records, maps, photographs, data on comparable sales, reports on water supply or the lack thereof, a complete list of the settlements and payments made by the United States for Foresta lots or property, together with a list of Foresta lots, if any, which have not been acquired, subdivision reports, utility company reports, soil or agricultural report, books, papers, documents and tangible things which now are or may be in your possession, and which are related to the above entitled cause" (R. 59, 60). His petition alleged residence of the named persons and asked the court to fix the place of deposition at the office of Meyer's counsel (R. 23-24). On October 12, 1964, the United States moved for a protective order limiting the extent of the depositions, stating, *inter alia*, that the United States had not yet determined which,

if any, of the named persons would be called as expert witnesses at the trial (R. 29). Appropriate stay order was sought and obtained pending a ruling on the motion (R. 25-28).

The issue was briefed by the parties (R. 44-103). On October 27, 1965, the district court filed its opinion, holding that discovery should be ordered without limitation (R. 104-113). On November 1, 1965, an order appropriate for an interlocutory appeal under 28 U.S.C. sec. 1292(b) was entered (R. 114). This Court, by order of November 23, 1965, denied an interlocutory appeal under the authority of *United States* v. *Woodbury*, 263 F.2d 784 (C.A. 9, 1959) (R. 115).

The depositions were taken on January 10, 1966, first of Robert Wilson, then of Charles Sortor and finally of James Hopper. They followed a similar pattern. Each had turned his files over to the Assistant United States Attorney. Mr. Wilson described his real estate appraisal experience, his employment by the National Park Service, and the actions he took in connection with his appraisal, including his visits to the Meyer properties (W. Tr. 2-5, 12-19, 24-25, 26).[1] When Meyer's counsel demanded the production of all papers listed in the subpoena, the witness replied that they had been turned over to the Assistant United States Attorney in three folders. The latter said he would make available those materials he believed to be proper subject of discovery (W. Tr. 7).

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[1] For purposes of this brief "Tr." refers to the transcripts of the depositions, while "W." indicates Wilson, "S" Sortor and "H" Hopper.

The deposition proceedings continued to define what was and what was not produced and may be briefly summarized as follows: Three file folders, containing the papers produced by Mr. Wilson, were marked Exhibits B, C, and D, and Meyer's counsel demanded that they be turned over to him *in toto* (W. Tr. 9-10). This was refused, the government attorney making clear that no claim was made of attorney-client privilege between the appraiser and the federal attorney (W. Tr. 10). The government position was stated as follows (W. Tr. 10-11):

> MR. BURBANK: With respect to both Defendant's Exhibit "C" and Defendant's Exhibit "D" for identification, "E" for identification, it is my position again with respect to each of those, as it was with respect to Defendant's "B", that you are not entitled to have a blanket inspection of Mr. Wilson's files, the materials in the files which under appropriate questioning is a proper area of discovery. It is not my intention to prevent you from having that. But a blanket inspection of Mr. Wilson's files I continue to resist.
>
> MR. ROBINSON: And would you, Mr. Notary, instruct Mr. Burbank to turn over Defendant's Exhibit "C" and "D" for identification.
>
> THE NOTARY-REPORTER: Mr. Burbank, will you please turn over those exhibits for identification to Mr. Robinson?
>
> MR. BURBANK: I respectfully decline to do so.

Matters that were produced were the appraiser's contract of employment and letters concerning employment (W. Tr. 13-18). A copy of a map without

the deponent's notations was offered to Meyer's counsel (W. Tr. 23), and answers to the amount paid him for appraising the Meyer property and for appraising other property were not objected to (W. Tr. 29, 31). When production of the witness' appraisal report was refused, the following colloquy occurred (W. Tr. 33):

> MR. ROBINSON: All right. I take it if I asked him any additional questions in connection with Defendant's Exhibit "N" there would be the same objection and there would be the same direction; is that correct?
>
> MR. BURBANK: Not necessarily. My objection only goes to an area of inquiry which calls for his opinion. If there are factual materials in there that are not as readily available to the landowner as they were to Mr. Wilson I would feel that you are entitled to have that material. There may be photographs therein that I would feel you would be entitled to examine. My instructions are based, insofar as it deals with any opinionated [2] material, either preliminary or conclusive, formulated by Mr. Wilson and expressed in that report.
>
> MR. ROBINSON: Q. How many pages in that report, Mr. Wilson?
>
> A. Approximately 31.

Copies of nine photographs attached to the report were not objected to (W. Tr. 34), nor were an attached map without notations (W. Tr. 37) and a map of the National Park System (W. Tr. 38). No ob-

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[2] This word appears throughout the transcripts. It should read "opinionative."

jection was made to testimony that the witness was employed by the Department of Justice to appraise the Meyer property, that he had made no report and that he had not finished his work (W. Tr. 48-49).

Material refused was a sheet containing pencil notations of Mr. Wilson, which was an enclosure in a letter concerning his employment (W. Tr. 17), and a map with similar notations, as follows (W. Tr. 21):

> MR. BURBANK: Let me ask you this question, Mr. Wilson. There is a lot of pencil notations appearing on this map. What do those pencil notations reflect?
>
> A. These would reflect considerable field notes and interviews, and some notes on different people, where they live, mileage, little sketches on the road blown up.
>
> MR. BURBANK: Does any of this material reflect opinions made by you on making the appraisal of this property?
>
> A. Yes.
>
> MR. BURBANK: I respectfully refuse to produce that. Do you want it marked for identification?
>
> MR. ROBINSON: Yes, mark it for identification.
>
> MR. BURBANK: Incidentally, Mr. Robinson, I am sure that Mr. Wilson has in his files—if he doesn't I will produce it for you to save you unnecessary inquiry—we have prepared a map of the Big Meadow and McCauley 40 in somewhat considerable detail. I believe it is in Mr. Wilson's file.

Also refused were two other maps with similar notations (W. Tr. 25, 26); the answer to questions as

to when and of what other properties he had made appraisals (W. Tr. 27); the length of time he had spent on such other appraisals, especially of some 50 properties 30 miles or more away from the Meyer land; his opinions of value of those other properties and other details, such as whether severance damage was involved (W. Tr. 28-29, 31); his appraisal report (W. Tr. 31-32); the number of comparables shown therein (W. Tr. 32); maps attached to the witness' appraisal report, which contained notations in blue or red pencil (W. Tr. 34); and a letter in his files from the Department of Justice and a sheet with some scribbled notes on it (W. Tr. 38). Meyer's counsel said (W. Tr. 38-39):

> MR. BURBANK: Let me ask you this. Do you want copies of the National Park System?
>
> MR. ROBINSON: Well, I would like copies of everything that is available to me. As a matter of fact, I would like everything.

After stating that he had arrived at an opinion of market value of the property, answer was refused as to the amount of that valuation, of portions of the property, as to sales considered, as to nature and character of the property, as to highest and best use (W. Tr. 42-47), and as to information he obtained from the assessor's office in Mariposa (W. Tr. 50). Meyer's counsel stated (W. Tr. 52):

> MR. ROBINSON: Now with reference—and I address this primarily to you, counsel—with reference to so-called comparable sales, I would want the record to show that I desire to go into each

> and every one of them that he has used or that he has investigated and decided not to use, I would want to go into the reason why he either used it or didn't use it. I want to go into all the material facts with reference to the comparability or the lack of comparability, and naturally into the date and the sales price, and matters of that kind insofar as comparable or so-called comparable sales or rejected sales that were concluded not to be comparable. I take it in each one of those you would direct him not to answer, and we would have the usual stipulation. Would that be correct?
>
> MR. BURBANK: With respect to each of those areas of inquiry, at my request I direct he not answer, and the same stipulation will apply in similar circumstances.

Answer was then refused to a series of questions as to whom he had consulted with regard to valuation of the property (W. Tr. 53-54), and as to specific sales (W. Tr. 55-57).

In conclusion, the appraiser testified that his refusal to answer was under instructions from the Assistant United States Attorney (W. Tr. 55). With this background, examination of Charles Sortor, a consulting engineer and appraiser, was substantially the same. Speaking of Mr. Sortor's appraisal report, the government attorney stated (S. Tr. 8-9):

> MR. ROBINSON: I haven't seen it. I wonder if you would go through it and indicate to me what part you are willing to let me have and what part not.
>
> MR. BURBANK: The report contains, among other things, nineteen photographs which I have

no objection to producing. A Horace Meyer plot map which I have no objection to producing. An area map—incidentally the area map is the area referred to in the deposition as Boundary Revision Map NP-YOS/2262 Y8-47-76. And what appears to be a portion of an automobile map Chevron automobile map. To those matters I have no objection.

MR. ROBINSON: Could I have those now then for the purpose of examining the witness?

MR. BURBANK: The record may show that I am handing Mr. Robinson pages 21, 22, 23, 24, 25, 26, each of which contain photographs and some explanatory material—I'm sorry—25 and 26 I am respectfully refusing to produce, it contains four photographs which apparently deal with alleged comparable transactions. Pages 21 through 25 inclusive are turned over. Also the Horace Meyer plot maps; also the area map referred to earlier as the Boundary Revision Map prepared by the National Park Service.

Later, the following colloquy occurred (S. Tr. 17-18):

MR. ROBINSON: Yes. Were there any soil analysis or drillings or borings made either in connection with that either before or after?

MR. BURBANK: We have had some drillings, borings made. The final report on that has been done by a combination of U. S. Bureau of Reclamation personnel and U. S. Geological Survey personnel. I have not as yet received a final report, completed report. When that report has been made, has been completed to the extent that it deals with facts and material, and material which I am sure would not be as readily availa-

ble to Mr. Meyer as it is to us, with the appropriate understanding with respect to compensation, which I concede you may have the right to contest, if you will, I have no objection to allowing you the opportunity to examine that report.

So also, Mr. Hopper's deposition was abbreviated. During his examination, the following occurred (H. Tr. 15-16):

Q. Now, is August 21, 1962 the last appraisal that you made on any of either Meyer or Foresta properties?

A. No, sir.

Q. When is the last one?

A. I just recently completed an appraisal of several improved properties within the Foresta subdivision. I say recently, within the last sixty days.

Q. And you didn't bring that file with you, is that it, or those files?

A. No, I didn't.

Q. Why?

A. Well, frankly I don't know. It never occurred to me. They weren't in the drawer with all of this stuff and I never thought of it until you just now asked the question.

Q. How would you describe those files?

A. How would I describe them?

Q. Yes.

MR. BURBANK: Perhaps I can save you some time. I will instruct Mr. Hopper to turn those files over to me and I will be happy to give you a letter advising as to what those files contain. Frankly, I learned of these appraisals for the

first time at lunch today. I didn't even know that they had been done.

MR. ROBINSON: Well, I want them included in the deposition.

* * * *

MR. ROBINSON: Q. How many of those are there?

A. There were seven, I believe, individual properties, all of the reports contained in one appraisal report.

Q. How would you identify that report?

A. As I recall, on the front of the report just as it was on these others, there is a front sheet which states "Appraisal of" and the name of these various properties, that is the names of the owners of these various properties.

Q. Tell us the names of all of the owners you can recall at the present time.

A. Hummell—gee, I just can't remember the names of any of the others, Mr. Robinson.

Q. Some seven or eight?

A. Seven of them.

Q. Seven. You filed that report sixty days ago, was that it?

A. Sometime within the last sixty days.

The witness testified that he had made an appraisal of the Meyer property in 1952 and discovery was demanded of all of the details of that appraisal (H. Tr. 20-21).

In April 1966, appellee moved to cite the appraisers for contempt for refusal to turn their files over to him (R. 121-124, 128-131). After hearing, the court made findings summarizing the earlier proceedings, and stating that at the hearing counsel for

the United States took full responsibility for refusal of the appraisers to produce documents or to answer questions (R. 156-160). The court concluded that it would be futile to order the appraisers to respond and that the United States had acted wilfully and in disobedience of the court's orders and is in contempt of the court (R. 160-161). Under Rules 37 and 45, F.R.Civ.P., and under its inherent power, judgment was entered dismissing the cause of action and ordering that the complaint, declaration of taking and order for delivery of possession "be stricken from the court's records" (R. 164).

SPECIFICATION OF ERRORS

1. The district court lacked jurisdiction to dismiss the case.

2. The district court erred:

(a) in refusing to limit the discovery sought by appellee.

(b) in denying the motion of the United States for a protective order.

(c) in not denying the motion to compel answer to questions propounded on deposition.

(d) in holding that the matters sought by appellee were the proper subject of discovery.

SUMMARY OF ARGUMENT

I

In *Hickman* v. *Taylor*, 329 U.S. 495 (1947), and *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), the Supreme Court has made it clear that the discovery

provision of the Federal Rules of Civil Procedure are of limited application. They are not to be read as compelling the delivery to a party of all materials, notes and even mental processes which his opponent or his witnesses have gathered or performed in preparing his case. The holding of the court below that discovery knows no bounds is plainly wrong.

II

A. Purely factual matters, such as maps of the area and the land condemned, photographs and the like, were supplied, even though no showing was made that this information was not equally, if not more readily, available to the demanding party, the landowner. The materials refused were the opinions, reasoning processes, notes, etc., of the independent appraisers whose results or processes had not been approved or accepted by the United States, or even in some instances not completed, and matters clearly not admissible in evidence, such as settlements or appraisals of other properties.

B. Not the slightest attempt was made to show good cause for requiring unlimited disclosure of the appraisers' files and thoughts. The district court excused this on the theory that no such showing was required in federal condemnation cases. Neither the rules nor the Supreme Court decisions warrant any such expansion of the rules for this particular class of cases.

The principal basis for this position seems to have been the district court's view that both parties to a condemnation case should definitively state their

claims as to the amount of just compensation prior to trial. The Federal Rule, 71A, provides otherwise. No specification as to the amount of claimed compensation is provided for either as to the complaint or as to the answer. The rule is specific that only those pleadings shall be filed and that "No other pleading or motion asserting any additional defense or objection shall be allowed." Thus, in seeking to require a binding statement of claimed value, the district court was seeking to amend the rule, since it agreed that the result should "cut both ways." Its exemption of condemnation cases from the good cause requirement therefore lacks foundation.

C. Discovery is limited to matter relevant to the subject matter of the action. The subject matter of a condemnation case is not any past connections between the parties, such as ordinary civil litigation in tort or contract, but is simply the just compensation payable for this property. On this issue the burden rests upon the condemnee, and the opinions of the owner, lay witnesses, realtors, bankers and professional appraisers may be offered. Thus, "market value" is not a fact peculiarly within the knowledge of any particular person.

In this case, the work of the appraisers has not been accepted and approved by the United States. Indeed, one of the appraisers has not even made his report to the Department of Justice. It cannot be said that the opinions or reasoning of those appraisers will be used at the trial. The mere fact that the Government may have received reports from appraisers it does not

vouch for or present at the trial is not admissible in evidence.

Other materials ordered disclosed are even more clearly irrelevant to the issues at the trial. It is well settled that settlements made as to other parcels have no bearing on just compensation, nor do jury awards for other parcels. It likewise follows that appraisals the deponents may have made of other lands would not be admissible in evidence, nor would their disclosure lead to admissible evidence. Even more remote is the ordered listing of lots not acquired (which is none of the appraisers' business, in any event) and notes made by the appraisers in the course of their investigations. No claim of use of discovery to prevent surprise can be made as to such matters which are inadmissible, as to witnesses, appraisals or reasoning the United States will not present, especially in view of the burden on the landowner to prove the amount of just compensation to which he is entitled. It is hard to see how he could claim surprise as to that issue unless he has failed to carry his burden.

III

In contrast to the lack of legitimate reason for Meyer to explore other matters ordered by the district court is the unjustified prejudice resulting to the United States and to the appraisers from such probing. The rules authorize the court to protect the party or the witness from annoyance, embarrassment or oppression and to prevent bad faith use of discovery. That authority should have been exercised here.

A. The United States has not approved or accepted, and does not vouch for, the opinions of the persons here examined or the reasoning by which their results were reached. Since no facts of use to Meyer's appraisers were withheld, the only use of the material ordered disclosed would be to attempt to discredit the testimony that might be given at the trial, if it were determined to use these witnesses.

Many perfectly legitimate reasons could result in a conclusion by the attorneys, in protection of the interests of the public represented by the United States, not to present particular opinions. More frequently, consultation and collaboration with respect to applicable federal condemnation principles may well cause appraisers to revise their judgment about various factors involved in reaching their opinions. It is not fair to prejudice the rights of a party—here the United States—by requiring such premature disclosure without an opportunity first to review and approve or disapprove the appraisers' processes. The initial report by an appraiser is simply a foundation upon which his testimony is based after thorough testing by the attorney and revision when necessary. There is even less justification for prejudicing the United States by notes, etc., made by the appraisers, in which the United States has no interest, because the concern is with the validity of the appraisal and the reasons for it, not the false starts or mistaken ideas the appraiser might have entertained sometime during his study.

B. For the same reasons, the discovery, delving into all of the appraiser's procedures and mental

processes in the making of the appraisal, embarrasses the appraiser without just cause. Important in this connection is the fact that appraisers are normally not expert at unambiguous self-expression, so that their reports can withstand the scrutiny of opposing counsel.

An important problem left undecided by the court below was the question of whether the appraiser should receive his usual payment for testifying and, if so, who should pay it. This is especially important, since the examination ordered is unlimited, going far beyond the matters which would be admissible at the trial. To compel the appraiser to testify without receiving his normal fee, or to compel a party other than the one insisting on delving into all of these matters to pay for the expert's time, would seem to be permitting discovery to become an instrument of oppression.

C. In *Hickman* v. *Taylor*, the Court held that the roughly termed "work product" of the lawyer in preparing his case by assembling information, sifting the relevant from the irrelevant facts, preparing his theories, etc., was not subject to discovery. Since the decision did not rest on the attorney-client relationship, no reason appears why it does not apply to those closely analogous functions of the professional appraiser. He performs similar functions and works in close cooperation with the attorney in preparing for the trial. In important areas these functions merge and cannot be compartmentalized. They should receive equal treatment under the discovery rules.

D. The purposes of the discovery rules will not be served by the unlimited disclosure ordered in this case. One purpose is to narrow and clarify the issues. But here there is only a single issue, i.e., just compensation. The facts have been disclosed. The other materials ordered disclosed here are the opinions and reasoning of the appraisers. Disclosure of these factors does not narrow the issue.

The discovery ordered will prolong, not shorten, the handling of this case. Since the issue ultimately turns largely on the weight to be given the opinions of the experts, the parties are entitled to, and do, show all the considerations upon which their conclusions are based. Consequently, issues such as qualifications of the experts, their understanding of the physical condition of the properties, the sales they relied upon, their opinions of highest and best use of the property, and the other factors they considered cannot be agreed upon, stipulated or eliminated from the case.

Rather than shortening the trial, the depositions here ordered would simply be a preview of the trial in much more lengthy terms because it is not confined to admissible evidence and is not taken in the presence of the judge who can limit time-wasting excursions into irrelevant or prejudicial matter.

IV

This Court has held more than once that, when a declaration of taking is filed, title vests in the United States and the courts have no jurisdiction to revest that title by dismissing the proceedings. *United States* v. *Cobb*, 328 F. 2d 115 (C.A. 9, 1964), and

cases cited. Rule 71A, F.R.Civ.P., which made the federal rules applicable to condemnation proceedings, was not designed to amend or modify the Declaration of Taking Act. Thus, although other remedies might be available for failure of the United States to turn over the appraisers' files, etc., the order of dismissal was not authorized.

ARGUMENT

I

The Federal Discovery Rules Do Not Accord a Party a Right to Compel Revelation of Everything He Would Like to Know From His Opponent or Possible Witnesses

The federal rules of depositions and discovery (Rules 26-37) were designed to provide "notice-giving, issue-formulation and fact-revelation" theretofore inadequately performed by pleadings. *Hickman* v. *Taylor*, 329 U.S. 495, 500 (1947).[3] The rules "create integrated procedural devices" (*Hickman*, p. 505), are to be accorded a broad and liberal treatment, and (*Hickman*, pp. 507-508):

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the *facts* underlying his opponent's case. Mutual knowledge of all the relevant *facts* gathered by both parties is essential to proper litigation. To that end, either party may com-

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[3] Because of the many citations of *Hickman* herein, it will be referred to simply as "*Hickman*," followed by the interpage citation.

> pel the other to disgorge whatever *facts* he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. *But discovery, like all matters of procedure, has ultimate and necessary boundaries.* As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege. (Emphasis supplied.)

Shortly later *Hickman* continued (p. 509):

> Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

More recently, the Supreme Court has emphasized the limitations on discovery in Rule 26(b) that the matter must be relevant to the subject of the pro-

ceeding; in Rule 30(b) that the court should prevent use of discovery devices in bad faith or to produce "undue annoyance, embarrassment or oppression;" and in Rules 34 and 35 that the movant must demonstrate "good cause." *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). *Schlagenhauf* declared (p. 121) that "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations," and held that mental and physical examinations could not "be ordered routinely in automobile accident cases" (p. 122). The Court also said that (p. 118): "Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation of that Rule," that the "ability of the movant to obtain the desired information by other means is also relevant" and (fn. 16) criticized the order of examination in "very broad, general areas." While dissenting because he thought good cause was shown, Justice Black agreed (p. 124) that "the order was broader than required."

The rulings below plainly violate these basic concepts of the discovery rules and would create an unlimited right to discovery of all notes, mental processes, etc., of appraisers in condemnation cases whose results or processes have not been approved by the party, here the United States, without any showing of justification therefor. This case goes even beyond the ruling which was reversed in *Hickman*, since we are dealing primarily with opinion, not fact, and much of the material ordered disclosed could not possibly be admissible in evidence or lead to admissible evidence and could only be used to produce injustice,

embarrassment to the public interest, and annoyance and oppression of the deponents.

These Supreme Court decisions, of themselves, we submit, compel reversal of the judgment. We shall now discuss the rules, and the decided federal condemnation cases which, we submit, justified the refusal to disclose, on the facts of this case, those materials which were withheld.

II

Ground for Discovery of the Materials Refused Was Not Shown by Appellee

A. *Purely factual data was not refused.*—Although no showing was made that the material sought, or similar material, was not equally available to Meyer (indeed, perhaps more readily, since he was the owner of the property), purely factual matters, such as maps, photographs and the like, were supplied. As we have listed in the Statement, *supra*, the materials refused were the opinions of the deponents, independent appraisers, which had not been approved and accepted by the Department of Justice, and the reasoning process that they had gone through, including all the notes they had made, or matters clearly inadmissible as evidence.

B. *No good cause was shown for requiring discovery of the matters refused.*—This case presents a situation where both Rules 26 and 34, F.R.Civ.P., were presumably invoked. The deponents were not regular government employees. They were hired under contract to perform this task for the Government.

Hence, their testimony was under Rule 26, making applicable Rule 30(b) empowering the court to limit such examination. Rule 34 requires any party "upon showing good cause therefor" and "subject to the provisions of Rule 30(b)" to produce documents "relating to any of the matters within the scope of an examination permitted by Rule 26(b)." *Hickman*, at page 512, holds that a showing similar to good cause may be required to overcome limitations upon depositions. Thus, the present issue is substantially the same, whether the oral deposition or production of the files is concerned.

There is nothing in the rules or the decisions to justify the notion of the court below (R. 109-110) that condemnation cases are an exception to the requirement of showing good cause.[4] As the Court said in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 118 (1964): "The courts of appeals in other cases have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. This is obviously true as to the 'in controversy' and 'good cause' requirements of Rule 35." In this connection, the district court emphasizes its view that the parties should reveal their claims of value prior to trial, apparently in a binding form. This is contrary to Rule 71A. No pleading of the claims of value is provided

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[4] See *United States* v. *6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195, 196-197 (N.M. 1955); *Continental Distillery Corp.* v. *Humphrey*, 17 F.R.D. 237, 241 (D.C. 1955); 4 Moore, *Federal Practice* (2d ed. 1963) sec. 34.02(2), pp. 2425-2426.

for. No such allegation is required in the complaint and, although a defendant waives other defenses by failure to answer, "at the trial of the issue of just compensation, whether or not he has previously appeared or answered he may present evidence as to the amount of just compensation to be paid for his property * * *." Rule 71A(e). Thus, the condemnee may not be restricted as to presentation of evidence by discovery rulings. The district court was either suggesting amendment to Rule 71A or uneven application of the rules when it reasoned that the discovery "goes on further than the pleading requirements of Rule 8" (R. 111; see also R. 112).[5] It should be remembered also that (*Evans* v. *United States*, 326 F.2d 827, 830 (C.A. 8, 1964)):

> The deposit of estimated compensation by the government is "no evidence of value" and has "no bearing whatsoever on value." Chapman v. United States, 10 Cir., 1948, 169 F.2d 641, 644. See, also, In re United States, 5 Cir., 1958, 257 F.2d 844, 849, certiorari denied, Certain Interests in Property, etc. v. United States, 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 228; United States v. 9.85 Acres in Hampton, Virginia, E.D. Va., 1959, 183 F.Supp. 402, 404-405, affirmed sub nom. Tidewater Development & Sales Corp. v. United States, 4 Cir., 1960, 279 F.2d 890. Nor, for that matter, does the deposit of estimat-

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[5] The court said (R. 111): "It goes without saying, however, that the allowance of discovery in these matters must cut both ways." In view of Rule 71A(e), how can the United States compel the condemnee to state his claim of value?

> ed compensation by the government establish a minimum for an award. This has been conclusively determined by the Supreme Court in United States v. Miller, 1943, 317 U.S. 369, 381, 382, 63 S.Ct. 276, 283, 284, 87 L.Ed. 336: * * *.

The reasons given by the district court are thus insufficient to justify judicial creation of an exemption from the good-cause requirement of discovery in condemnation cases. This lack of good cause was given as the ground for denial of discovery of appraisal matters in condemnation cases in *United States* v. *Certain Parcels of Land in San Francisco*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States* v. *Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (S.D. Cal. 1954); *United States* v. *6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195 (D. N.Mex. 1955); *United States* v. *4.724 Acres of Land in Plaquemines Parish*, 31 F.R.D. 290 (E.D. La. 1962); *United States* v. *284,392 Square Feet of Floor Space, Etc.*, 203 F.Supp. 75 (E.D. N.Y. 1962).

C. *The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case.*—Rule 26(b) limits oral examination to matter "which is relevant to the subject matter involved in the pending action." The rule ties relevancy to the pleadings by continuing "whether it relates to the claim or defense of the examining party or to the claim or defense of any other party." Rule 34 incorporates this limitation. The last sentence of Rule 26(b) illustrates the mean-

ing of "relevant" by providing "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." On the other hand, *Hickman*, p. 508, emphasized the function of the court to prevent delving into irrelevant matter, and the Notes of the Advisory Committee, explaining the amendment adding the last sentence, said: "Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry * * *." See Note, 28 U.S.C.A., Rule 26(b), p. 290.

A condemnation case does not involve resolution of claims or defenses resulting from past transactions or occurrences between the parties, as in the case of normal civil litigation, such as tort cases, contract claims, and the like. No pleadings as to the amount of just compensation are provided for (*supra*, p. 32) and, although the United States is the plaintiff, the burden of proof on this issue is on the landowner. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266 (1943); *Wilson* v. *United States*, 350 F.2d 901 (C.A. 10, 1965); *United States* v. *Glanat Realty Corp.*, 276 F.2d 264, 266 (C.A. 2, 1960); *United States* v. *Certain Parcels of Land in Rapides Parish*, 149 F.2d 81 (C.A. 5, 1945).

The "subject matter" under Rule 26 is the amount of just compensation which, under federal principles, is the fair market value at the date of taking. *United States* v. *Miller*, 317 U.S. 369 (1943). For real estate, which rarely has an active daily market, "the

application of this concept involves, at best, a guess by informed persons" (*Id.*, p. 375). It follows that market value is not a fact peculiarly within the knowledge of any person or any particular group of persons. Many different types of persons are permitted to express opinions of value, such as landowners, lay witnesses from the vicinity, local real estate dealers or brokers, and expert appraisers, e.g., *Ruud* v. *United States*, 256 F.2d 460 (C.A. 9, 1958). In *United States* v. *60.14 Acres of Land in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1966), the court said (p. 668):

> All opinion evidence of market value is to some extent inherently speculative (see Kimball Laundry Co. v. United States, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); United States v. Miller, 317 U.S. 369, 374-375, 63 S.Ct. 276, 87 L.Ed. 336 (1943)), for it seeks to describe in the form of a realistic event what is a theoretical construction,—something which in fact did not occur.

The mere fact of employment of appraisers and their rendering of reports in this case does not mean any admissible evidence can be discovered by examination of the appraisers and their files.[6] The United States has not reviewed, approved or endorsed the results of the appraisals. It has not examined the reports or the adequacy of the reasons for the results, and has not satisfied itself with regard to their valid-

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[6] Discovery was sought even of incomplete appraisals made as to other lands presumably not yet in condemnation and as to any appraisal of the Meyer property not yet completed.

ity in law or fact. As the Assistant United States Attorney pointed out (R. 29), no decision has been reached as to whether these appraisers will be used at all at the trial. And Mr. Wilson testified that his appraisal for the Department of Justice had not been completed (W. Tr. 48-49). We detail later the reasons why it is highly prejudicial and unjust to the United States and to the appraisers to turn those tentative appraisals over to the exacting scrutiny of hostile opposing counsel. Our present point is that no reason can be given to justify discovery of opinions of persons who will not testify to value at the trial. In *United States* v. *Certain Parcels of Land, Etc.*, 15 F.R.D. 224, 233 (S.D. Cal. 1954), the court said: "It must be noted, however, the opinions are and will remain wholly incompetent and immaterial as evidence unless and until the appraisers are called as witnesses upon the trial and are shown to be experts qualified and prepared to give competent opinion testimony as to the value of the property in controversy." Speaking of experts who were not called by the Government as witnesses at the trial, the court, in *Dicker* v. *United States*, 352 F.2d 455 (C.A. D.C. 1965), cert. den., 383 U.S. 936, which found it unnecessary to pass on the correctness of the district court's refusal of discovery of these appraisers' reports, said (p. 457):

> That the Government consulted them but did not use their opinions is not relevant evidence of value; Appellants could not show the prior consultation in order to bolster the witnesses'

> credibility, nor could they seek to arouse jury prejudices by showing the prior consultation under the guise of proving the experts' qualifications. If Appellants wanted more expert testimony on value it was for them to produce such evidence.

As indicated, even if the United States decided to call the appraisers, they might be held not to be qualified, e.g., *United States* v. *Johnson*, 285 F.2d 35 (C.A. 9, 1960); *United States* v. *60.14 Acres of Land in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1966), and, again, the opinions of those experts and the reasons for them are completely irrelevant to the issue in the case.

Other materials ordered delivered are even more remote from the issue in the case. Pursuant to the policy of the law to encourage settlements and to avoid collateral issues, the amount paid for other parcels as the result of settlements or condemnation awards is not admissible in evidence at the trial of a particular parcel. "It seems too obvious for argument that another jury estimate from the evidence submitted to it would have no probative value in this case." *Justice* v. *United States*, 145 F.2d 110, 111 (C.A. 9, 1944). In affirming the exclusion of the prices paid by the United States in settlement of condemnation proceedings, the court, in *United States* v. *13,255.53 Acres of Land in Burlington and Ocean Counties*, 158 F.2d 874, 877 (C.A. 3, 1946), declared: "Testimony of the price paid by the condemnor for other tracts is not admissible." And *Slattery Company* v. *United States*, 231 F.2d 37, 41 (C.A. 5,

1956), agreed, saying: "This rule, based upon the view that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value, is the generally prevailing rule in this circuit and elsewhere." See, as to settlements generally, *Home Ins. Co.* v. *Balt. Warehouse Co.*, 93 U.S. 527, 548 (1876).

Thus, the discovery here ordered (*supra*, p. 10) as to settlements and payments made in other cases could not possibly lead to admissible evidence and would violate the policy of encouraging settlements by preventing their use to the prejudice of the parties making the settlements or payments. And again, since the issue of the case is the value of the property involved at the date of taking, a list of lots which have not been acquired (the decision as to acquisition being no business of the appraisers), appraisals of other properties, appraisals of the same property 10 years earlier, and incomplete appraisals of other properties (*supra*, pp. 10, 15, 18) have, we submit, no relevancy to the issue of value in this case and were inadmissible. The various notes the appraisers made in the course of their investigations are again remote from the issue in the case, which is the just compensation payable for the property. The same is true as to comparable sales rejected.

The theory that discovery may be used to prevent surprise does not support the explorations ordered by the district court. Certainly as to inadmissible evidence or as to matters rejected by the appraisers, Meyer will not be surprised. Since he is the land-

owner and has the burden of proof as to just compensation, he could be surprised by elements relevant to that issue only to the extent that he has not undertaken to carry his burden of proof. The comment of Justice Jackson concurring in *Hickman* is appropriate here (329 U.S. at p. 516):

> Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

Again the claim of "surprise" certainly cannot be made as to witnesses the United States does not offer or as to reasoning the witnesses do not use. Under these circumstances, the only "surprise" could consist of not knowing exactly what every witness would testify to prior to the trial, i.e., that the case has not yet been tried. The discovery rules were clearly not intended to provide a dry run of a trial so that any possible mistakes of judgment or otherwise can be avoided.

In this point we have shown that the landowner failed to establish affirmative basis under the discovery rules of need to prowl through the appraisers'

files with regard to the irrelevant material which was refused, and pick their brains as to matters they discarded, etc., especially when the United States has not endorsed their reasoning or conclusions. We now turn to the other side of the coin to show the injustice to the public and to the appraisers which results from failure to apply the protective provisions of the discovery rules in cases like this one.

III

The Protective Provisions of the Discovery Rules Should Preclude the Unlimited Discovery Sought by Appellee

When the United States sought a protective order, the district court denied it completely without limiting discovery in any way except for some undefined provision for paying the appraisers for their time (R. 112). When the depositions were taken, appellee's counsel demanded everything, including broad oral examination of the appraisers (see *supra*, pp. 15-16). In issuing the contempt order, the district court did not indicate any thought that this position was more far-reaching than it contemplated. We submit that the court should have exercised its authority under Rule 30(b) and (d) "to protect the party or witness from annoyance, embarrassment or oppression" and to prevent bad faith use of the discovery procedures.[7]

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[7] In *Schlagenhauf*, the Court said (379 U.S. at p. 121, fn. 16): "Moreover, it seems clear that there was no compliance with Rule 35's requirement that the trial judge delineate the 'conditions, and scope' of the examinations. Here the examinations were ordered in very broad, general areas."

A. *The discovery here sought was unjust to the public.*—A basic rule in federal condemnation which unfortunately seems often to be forgotten is that "it is the duty of the State, in the conduct of the inquest by which compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl* v. *School District, Lake County*, 133 U.S. 553, 562 (1890).

Neither the opinions of value, the reasoning by which they were reached, nor any other of the matters refused have been accepted, approved or vouched for by the United States. We are not here concerned with concealment of any facts needed by appellee for his appraisers to prepare their opinions or claims. The only possible use, in connection with the trial of this case, that appellee could make of the materials he seeks would be to discredit the appraisals or to secure the admission, by indirection, of evidence which is not admissible in federal condemnation trials. It would, we submit, be unfair to prejudice the public interest by permitting such collateral matters, unapproved and not vouched for by the Government, to affect the amount of just compensation.

Valuation in condemnation is a complex appraisal-legal problem, where fair presentation of each party's case requires close cooperative effort between the appraiser and the trial attorney. The district court suggested the theory that the appraiser is non-partisan and is not to be influenced by the lawyer who hires him (R. 111-112). Judge Murrah said in

United States v. *Chapman*, 158 F.2d 417 (C.A. 10, 1946), in reversing a condemnation case where a juror (Tomlinson) had appeared as an expert witness for the condemnee in an earlier case (p. 421):

> Tomlinson appeared as a witness in the Surber condemnation proceedings not to give facts, but to express an opinion as an expert on values. This of course is not only acceptable and desirable, but essential to a decision on the vital issue in the case. But, no one would be so naive as to believe that an opinionated witness is free from bias on the side of the issues he supports.

The literally hundreds of appellate decisions in federal condemnation cases, showing the divergence of opinion of the experts on the two sides of such cases, confirm this fact. An attorney who presented the evidence of an expert for whom he did not vouch would be derelict in his duty to his client and to the court.

Since value is not an absolute fact, there are bound to be divergences of opinion. And, for many reasons, a few of which we will outline, the fact is that the original report from the appraiser is no more than an initial beginning from which his final testimony is fashioned in conjunction with the lawyer. Because of the need for review of appraisals, there is in the Land and Natural Resources Division of the Department of Justice a section designated the "Appraisal Section," which reviews the appraisals submitted by those who have been hired. The appraisals are also reviewed by the attorney who will try the case and often by an attorney in the Department. The result

of these reviews is often a decision not to present the testimony of particular appraisers or, more frequently, revision of their reasoning, supplementation of data, and possible change of opinion, primarily because of the difference between federal condemnation principles and applied by many states. Because of the requirements of supervision, of consistency of position, and of preservation of the policy of fairness, both to the public interest and to the landowner, in the handling of some 20,000 cases (tracts) annually, the United States must use procedures more elaborate than do landowners. However, essentially the same process of attorney-appraiser collaboration is employed by any experienced attorney for a condemnee.

One of the perfectly legitimate causes for rejection or revision of the initial appraisal is the difference between federal and state law. Local appraisers with experience under their own law often need correction in this regard which may result in a different final result. The difference is not obvious or simple to ascertain. For example, in many states, such as Pennsylvania, the basic term "market value" has a meaning different from the federal market value standard. *United States* v. *60.14 Acres in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1965); *United States* v. *Certain Parcels in Philadelphia (Wainwright)*, 130 F.2d 782 (C.A. 3, 1942). The fact that many states award compensation when property is damaged, contrary to the federal rule (*Batten* v. *United States*, 306 F.2d 580 (C.A. 10, 1962), cert. den., 371 U.S. 955), often requires the revision of appraisals to exclude particular elements

considered. Again, the federal rules as to set-off of benefits is not limited by the arbitrary rule of many states that no set-off may be made against the value of the land taken but only against severance damage.

Other inadequacies or errors of appraisals revealed by review include failure of comparable sales cited to support the result; inadequacy of the report as to comparable sales; use of a reproduction process in an inappropriate case; capitalization of projected future income, especially when it is not reduced to a present cash value (the federal standard); failure to understand the nature of the interest to be valued, especially in easement takings; and separate valuation of elements, rather than value as a whole. These are only a few examples of the many reasons that revision of the initial appraisals may perfectly legitimately be required. This is not to suggest that appraisers are incompetent or make an unreasonable number of mistakes. No one is perfect, and review and correction of almost everyone is at times required. One analogy is the review of trial courts by courts of appeals. The increasing volume of work, which affects appraisers as much as any other area of endeavor today, makes it more likely that particular matters will be overlooked or not completely done. As in other areas today, completeness and correctness war with the volume of work to be done.

To permit the discovery and use by hostile counsel of these initial, unapproved appraisals would, we submit, be unjust to the public. Analogous is Mr. Justice Jackson's comment in concurring in *Hickman* (pp. 517-518):

> And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Is it fair to prejudice the United States with an appraisal which it does not accept or approve? Is the United States concealing evidence when it rejects an opinion it believes is unsupportable or wrongly founded?

The other material in the appraisers' files which Meyer sought was even more plainly prejudicial. It is the validity of the final appraisal with which the United States is concerned and not with the notes, mistaken approaches, etc., which may have been made in the earlier stages of the appraisal. The United States would have no occasion to examine and approve or disapprove of the appraisers' files. They have nothing to do with the issue in the case and should not, we submit, be the subject of discovery.

The fact is that there was neither necessity nor justification for the discovery the court ordered. The basic purposes of the discovery rules would not be served thereby. Hence, it would be, we submit, "oppression" within the meaning of Rule 30(b) to require the United States to expend the time of its at-

torneys and the money required to appear at such deposition proceedings.[8]

B. *The discovery here sought would annoy and embarrass the appraisers.*—The annoyance and embarrassment to the appraisers if they are compelled to turn over their entire personal files to hostile counsel are obvious. Here again, the fact that the initial appraisal may be modified in many ways, after review and consultation with trial counsel, is important. At the trial, only the appraiser's opinion, as then expressed, and the reasons for it are germane to the issue—just compensation. His preliminary notations have no relevancy and should not be discoverable. The reasons why it is unfair to the United States to require disclosure of unreviewed and unapproved appraisals also demonstrate unjustified embarrassment to the appraiser which will result from such disclosure.

Also important here is the fact that appraisers may not express themselves with complete precision. Any lawyer knows the difficulties of expressing thoughts in unambiguous and unmistakable language, especially in those papers which must meet the critical eye of the opposing counsel. Justice Jackson's comments in *Hickman*, as to the discovery from the

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[8] The impression is apparently widespread that the Department of Justice has unlimited funds and personnel available and, hence, such considerations are unimportant. This is not the fact and any diversion of such time and money to unnecessary activities impedes and delays the conduct of other cases, condemnation or otherwise, to which the United States is a party.

lawyer, apply with even greater force to the appraiser who is not skilled in unambiguous self-expression. The statement is (329 U.S. at pp. 516-517):

> The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Everyone who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps

against that of his chief witness, or possibly even his client.

A problem which has bothered many courts, but which was simply left up in the air by the court below, concerns payment to the appraiser. The interests of three parties are concerned. In giving the testimony in response to the discovery order, the appraiser is performing his professional function and should be paid accordingly.[9] He should receive his regular fee for testifying and not merely that of a witness who, for example, has observed an accident. Since he is performing his ordinary professional duty, that fee should not be subject to the discretion of the court, any more than is his fee for testifying at the trial. In view of the unlimited examination without regard to relevancy or admissibility, the testimony ordered by the court below at the preliminary trial will, in terms of time, probably be much more important to the appraiser than the trial itself.

Although some courts have suggested splitting of the fees between the parties, no reason appears why the party who insists in delving into all of the appraiser's activities and his mental processes should not bear that expense. The discovery could truly become a means of oppression within the meaning of Rule 30(b) and (d), if the objecting party is compelled to pay part of the fee and if, in the absence of the court, the attorney is permitted, as sought here,

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[9] It has been held that the very fact that the appraiser is a professional employed by one party precludes discovery. *Hickey* v. *United States,* 18 F.R.D. 88 (E.D. Pa. 1952).

to explore every sale rejected, every other appraisal made and all other such matters.

C. *The "work product" principle of* Hickman *v.* Taylor, *329 U.S. 495 (1947), should preclude the discovery here sought.*—The term "work product" was used in *Hickman* by the court of appeals to describe the various materials collected in an attorney's file in the process of preparing his case. The Supreme Court said (pp. 510-511):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

> An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman specifically rejected the attorney-client privilege as the ground for refusal of discovery (p. 508). No reason appears why *Hickman* should be confined to attorneys, rather than applied to other persons whose functions are similar. Much of the reasoning above applies to an appraiser who, while not an advocate, should be free to go about his way ascertaining the facts, investigating sales, interviewing parties to the sales or other persons in the vicinity, rejecting irrelevant facts, preparing his valuation theories, etc. As in the case of the attorney, this work is reflected in notes of personal impressions, tentative conclusions reached, etc. But here, appellees' counsel said (*supra*, p. 16): "I would want to go into the reason why he either used it or didn't use it [a particular comparable sale]." Thus, going beyond the written materials sought in *Hickman*, this case throws wide open the door to everything the appraiser did.

As we have noted, the appraiser and attorney must work together to produce the final result. Their functions, while separate in some particulars, merge in important areas and their efforts cannot be compartmentalized. The attorney's file resulting from

these efforts is not the subject of discovery. Why should the appraiser have less protection? He, like the attorney, is performing a professional function of importance in the field of just compensation. For these reasons, we think that the *Hickman* rule applies to condemnation appraisals. See, e.g., *United States* v. *Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953). Other courts have expressed the same idea in saying that "Yet, not every document is, *ipso facto*, discoverable. Hickman v. Taylor * * *. One of the lines of limitation, which federal courts have drawn, relates to the discovery of opinionative material." *United States* v. *Certain Parcels of Land in San Francisco*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States* v. *4.724 Acres in Plaquemines Parish*, 31 F.R.D. 290 (E.D. La. 1962); *United States* v. *7,534.04 Acres in Bartow and Cherokee Counties*, 18 F.R.D. 146 (N.D. Ga. 1954); *United States* v. *284,392 Square Feet of Floor Space, Etc.*, 203 F.Supp. 75 (E.D. N.Y. 1962).

The court below has simply held that *Hickman* does not apply to condemnation cases (R. 109-110). Like the court's holding (discussed *supra*, pp. 31-33) that the "good cause" limitation does not apply to condemnation cases, this distinction is unsupportable.[10]

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[10] The quotation (R. 109) from Friendenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stanford L.Rev. 455, 472-473, has no relevancy to initial apprasial reports in condemnation cases which, as here, have not been approved and accepted for trial purposes and does not apply to appraisers who, like the attorney, are weighing the value of certain evidence, i.e., the bearing various factors have on his opinion of value.

D. *The purposes of the discovery rules will not be served by the discovery here ordered.*—One objective of the discovery rules is to "narrow and clarify the basic issues between the parties." *Hickman*, p. 501. No such function is served by discovery of expert opinions in condemnation cases. There is only a single issue—the amount of just compensation. *McCandless* v. *United States*, 298 U.S. 342, 348 (1936). It is only those cases where there is substantial divergence in the position of the parties that come to trial. The fact is that more land needed for federal purposes is acquired by voluntary purchase than by condemnation. And of the cases embraced in condemnation proceedings, only a small percentage is actually tried.

The basic issue of just compensation cannot be narrowed. The facts were disclosed. The other materials relating to the opinion and reasoning of the experts are simply the factors relevant to that conclusion. The objective of each trial attorney is to present a persuasive case to the jury and demonstrate that his experts gave thorough consideration to all relevant factors. Consequently, the competent attorney will not stipulate to a factor so as to eliminate its consideration in detail. For example, on the threshold question of qualifications of the experts, the parties are entitled to and do outline the qualifications, even though their opponents do not claim they are unqualified. Another example is the fact that, even though there is frequently agreement as to the physical nature and condition of the property, each

expert describes such features to demonstrate the thoroughness of his investigation and the correctness of his understanding of the facts to demonstrate the soundness of his opinion. So also, in most cases comparable sales evidence is offered, not as direct evidence of value, but as factors considered by the experts in reaching their conclusions for the purpose of judging the weight to be given their testimony. See, e.g., *United States* v. *Johnson*, 285 F.2d 35 (C.A. 9, 1960). This is not cumulative evidence since, for the credibility of the experts, it is their understanding of such facts, as much as the facts themselves, that is important in the condemnation trial. As the court put it in *United States* v. *25.406 Acres of Land in Arlington County, Va.*, 172 F.2d 990, 993 (C.A. 4, 1949):

> Testimony as to value would be worth little or nothing, if witnesses were not allowed to explain to the jury their qualifications as experts and the reasoning by which they have arrived at the expert opinion to which they testify; and the rule is that they may thus give the grounds of their opinions. Wigmore on Evidence 2d Ed. sec. 562; Lewis, Eminent Domain 3d Ed. sec. 654.

For the same reasons, discovery such as has been ordered in this case will extend, not shorten, the handling of the case. Counsel sought, and the court has authorized, in effect what might be called a preliminary trial far more extensive than the actual trial, because it is proposed, without any limitation by the court, to pursue many matters which would be ex-

cluded at the trial (*supra*, pp. 37-38). Counsel said (*supra*, pp. 15-16): "I desire to go into each any every one of them [possible comparable sales] that he had used and that he has investigated and decided not to use, I would want to go into the reason why he either used it or didn't use it." In the normal process, the professional appraiser will investigate all sales, catalogue, for example, as many as 150 of them and then find those most comparable to the lands involved. Cf. *United States* v. *60.14 Acres in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1965). As we have noted, this extensive, preliminary examination will have little, if any, likelihood of reducing the length of the jury trial. On the contrary, it would undoubtedly produce additional collateral matters in an attempt by counsel to show at the trial that the witness was departing from what he said at the discovery proceedings. Compare Mr. Justice Jackson's comments in *Hickman* quoted *supra*, p. 47. Why else does counsel want to discover such matters? Certainly he does not want to find out about these sales so as to tell his own appraiser about them. That appraiser's testimony would be of little weight if he said "I found out about my sales from the testimony of the government appraiser."

In *Lewis* v. *United Air Lines Transport Corporation*, 32 F.Supp. 21 (W.D. Pa. 1940), the court said (p. 23):

> To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a consid-

> erable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

See also *United States* v. *Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States* v. *6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195 (D. N.M. 1955); *United States* v. *900.57 Acres in Johnson and Logan Counties*, 30 F.R.D. 512, 520 (W.D. Ark. 1962).

In addition, when, as here, a deposit has been made, Rule 71A(j) provides that "In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited *and for the ascertainment and payment of just compensation.*" (Emphasis supplied.) To impose the burden of the discovery here ordered upon the normal delays and expenses caused by the volume of condemnation cases would be unwarranted, contrary to the purposes of the federal rules, and would serve no legitimate purpose of the discovery rules. The practicalities of the situation are well described in *United States* v. *900.57 Acres in Johnson and Logan Counties*, 30 F.R.D. 512, 521 (W.D. Ark. 1962), as follows:

During the last 20 years thousands of tracts of land have been acquired by the Government through the court for the Western District of Arkansas. This is the first instance in which a landowner has filed interrogatories or has sought to obtain appraisal reports. In practically every controversy between the Government and the landowner as to just compensation, both sides have adduced testimony to establish any and all facts which might be relevant in ascertaining just compensation. Almost without exception, a witness testifying to such facts concludes his testimony by stating his opinion as to the market value, and in that manner justice is done to the Government and to the landowner. It would be an innovation and greatly prolong the trial at the expense of the parties were the court to fail to sustain the objections of the plaintiff to the interrogatories and to the motion for production of documents. In fact, as suggested by Judge Sanborn, such a holding would entirely divorce practical common sense from the trial and lead to rank injustice to either the Government or the landowner.

IV

In Any Event, the District Court Had No Jurisdiction to Set Aside the Declaration of Taking and Dismiss the Proceeding

"This court has held in United States v. Carey, 9 Cir., 143 F.2d 445, 450, and in United States v. Hayes, 9 Cir., 172 F.2d 677, 679, that when a declaration of taking is filed and deposit is made, title vests in the United States and the district court is

powerless to dismiss the proceedings. In accord is United States v. 2,974.49 Acres, 4 Cir., 308 F.2d 641." *United States* v. *Cobb*, 328 F.2d 115, 116 (C.A. 9, 1964). This Court further pointed out (p. 117): "Of course, it is elementary that the Government could take the property without any deposit and leave the owner to his remedy in the Court of Claims under the Tucker Act. United States v. Dow, 357 U.S. 17, 21, * * *."

So here, the judgment setting aside the declaration of taking and dismissing the proceedings was, we submit, plainly beyond the jurisdiction of the district court. It is no answer to say that the federal discovery rules (Rule 37(b)) authorize such action. Without regard to what other such sanction may be applied in condemnation cases for failure to discover, we submit that the judgment entered below cannot be sustained. In *Carey, supra*, this Court held that such action could not be taken for alleged lack of prosecution.

The adoption of Rule 71A did not enlarge the powers of the court. This would seem to be a matter of substance, i.e., vesting of title in the United States, and, hence, beyond the reach of procedural rules. Cf. *United States* v. *Sherwood*, 312 U.S. 584 (1941). In any event, the rulemakers specifically denied an intent to amend the Declaration of Taking Act by Rule 71A. The notes refer to that Act and say (28 U.S.C. Rule 71A, p. 387): "Rule 71A is not intended to and does not supersede the Act of February 26, 1931, c. 307, §§ 1-5 (46 Stat. 1421), 40 U.S.C.A. § 258a-258e * * *" and Rule 71A(a) provides that the other

rules "govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule." Some of the other sanctions of Rule 37(b) also cannot apply to condemnation cases as regards the issue of just compensation. No pleadings are provided for on the issue; hence, an order cannot be entered under Rule 37(b)(2)(ii) refusing to allow a party to support or oppose designated claims or defenses or entering judgment by default under Rule 37(b)(2)(iii). These considerations simply add emphasis to the fact that the opinions and reasoning of expert appraisers or other possible witnesses as to value are not, at least in the preliminary stages prior to review and approval, within the objectives and purposes of the discovery rules.

CONCLUSION

It is submitted that the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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